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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 414

SHERMAN R. RING AND JACK B. BRODY, INDIVIDUALLY AND PARTNERS TRADING AS R. & B. TRUCK & PARTS CO.,
Appellants,

vs.

MAYOR AND COUNCIL OF THE BOROUGH OF NORTH ARLINGTON, BERGEN COUNTY, NEW JERSEY,
Appellees

STATEMENT OF JURISDICTION

In compliance with Rule 12 of the Revised Rules of the Supreme Court of the United States, the appellants submit herewith their statement showing the basis of the jurisdiction of the Supreme Court to entertain the appeal in this cause.

1. The jurisdiction of the Supreme Court of the United States is invoked under Section 237 (a) of the Judicial Code, 28 U. S. C. A., Section 344 (a).

2. The ordinance of the Borough of North Arlington, New Jersey, the validity of which is involved herein, is entitled, "An Ordinance to raise revenue, license and regulate the use of premises by dealers in used motor vehicles and parts thereof, in the Borough of North Arlington,

County of Bergen, State of New Jersey," approved December 17, 1946, known as Ordinance No. 604, and provides, to the extent here material, as follows:

> "Section 1. It shall be unlawful for any person, firm or corporation to use any premises in the Borough of North Arlington, for the purpose of engaging in the business of purchasing, selling and exchanging used motor vehicles and parts thereof, or for the purpose of storing used motor vehicles and parts thereof for sale or exchange, without first obtaining a license therefor from the Mayor and Council of the Borough of North Arlington, as hereinafter provided.
>
> "Section 2. Any person, firm or corporation desiring to engage in the business of purchasing, selling and exchanging used motor vehicles and parts thereof, or desiring to store used motor vehicles and parts thereof, for the purpose of sale or exchange, shall make a separate application in writing for the granting of a separate and distinct license for each separate and distinct location where the business of engaging in the sale, purchase or exchange of used motor vehicles and parts thereof is maintained or conducted, or where used motor vehicles and parts thereof are being stored for the purpose of sale or exchange.
>
> "For the purposes of this ordinance, a separate and distinct location shall mean any premises, which consist of a part of one or one or more lots, as set forth on the Tax Map of the Borough of North Arlington, and which part of lot or lots are adjacent and contiguous to each other, and if described by metes and bounds would have one continuous and uninterrupted boundary line."

3. The nature of the case is as follows:

Since 1924, appellants and their business predecessors have conducted the one business of dealers in used motor vehicles and parts thereof on premises on River Road, North Arlington, New Jersey, as one complete business

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unit and location. From 1924 to 1937, inclusive, the Borough of North Arlington exacted no license fees from appellants for the use of said premises for the conduct of their said business. From 1938 to 1945, the Borough of North Arlington exacted from appellants only one license fee each year for the use of all of said premises.

In 1945, the said Borough adopted two ordinances separately licensing the business of used motor vehicles and the business of parts of used motor vehicles. In the case of *Ring* v. *North Arlington*, 134 N. J. L. 407, 48 A2d 705, the former Supreme Court of New Jersey held that the two endeavors constituted but one business, and that, therefore, the ordinance separately licensing parts of used motor vehicles was invalid.

On December 3, 1946, the said Borough adopted Ordinance No. 604, which is the ordinance here in question, and exacted thereunder from appellants three annual license fees for 1947, for the aforesaid premises, for the conduct of their business.

4. The grounds upon which it is contended that the questions involved are substantial, are:

From the very start and throughout these proceedings, appellants have contended that the ordinance in question is invalid, because the definition of a licensable location contained therein is arbitrary, unfair and unreasonable, in that it permits the Borough of North Arlington to exact and collect from the appellants three annual license fees instead of one annual license fee, for the conduct of their business, while it permits the said Borough to exact and collect only one annual license fee from others in the same business.

These questions were raised in the former Supreme Court of New Jersey, on Certiorari, and in the new Supreme Court of New Jersey, on Appeal, by Reasons of

Appeal and Grounds of Appeal, and in the Briefs and Arguments.

The former Supreme Court of New Jersey, whose Opinion is reported in 136 N. J. L. 494, 56 A2d 744, held that the ordinance in question is valid, and said that:

> ". . . it was within the legislative province to levy a license tax for regulation and revenue upon each and every place of business of the subject class, even though under a common ownership and management." (p. 499), and
>
> "Where there is a physical separation of the premises, there is a separate and distinct location whose business is treated as a single economic unit subject as such to the power exerted by the ordinance . . .", and
>
> "There is no indication of illegal discrimination in the fact that another like establishment near to prosecutors', having approximately the same land area as the total of prosecutors' several places of business, is liable for only one license fee as the ordinance is written." (p. 500).

The new Supreme Court of New Jersey, the highest court of the State of New Jersey, affirmed the judgment of the former Supreme Court of New Jersey, in a Per Curiam Opinion filed on October 4, 1948.

The effect of the judgment of the Supreme Court of New Jersey, the highest court of the State of New Jersey, sustaining the validity of the ordinance in question, is to permit the Borough of North Arlington, New Jersey, to exact and collect from appellants three annual license fees instead of one annual license fee, for the conduct of their said business, while it permits said Borough to exact and collect only one annual license fee from others in the same business; which is repugnant to the provisions of Section 1 of the 14th Amendment to the Constitution of the United States, and deprives appellants of their prop-

erty without due process of law and denies to them the equal protection of the law.

5. The final judgment appealed from was made and entered on the 4th day of October, 1948.

6. The application for appeal is presented on the 21st day of October, 1948.

7. Copies of the Opinion of the former Supreme Court of New Jersey, and of the Per Curiam affirmance thereof by the new Supreme Court of New Jersey, are appended hereto.

8. Cases believed to sustain the jurisdiction of the Supreme Court of the United States, are:

Independant Warehouses, Inc. v. *Scheele,* 331 U. S. 70, 67 S. Ct. 1062, 91 L. Ed. 1346;

King Mfg. Co. v. *Augusta,* 277 U. S. 100, 48 S. Ct. 489, 72 L. Ed. 801.

Respectfully submitted,

ABRAHAM ALBOUM,
Attorney and Counsel for Appellants.

Dated: October 21, 1948.

APPENDIX "A"

COPY OF OPINION OF NEW JERSEY SUPREME COURT.
REPORTED IN 136 N. J. L. 494

NEW JERSEY SUPREME COURT, No. 221, MAY TERM, 1947

SHERMAN R. RING and JACK B. BRODY, Individually and as Partners Trading as R. & B. Truck & Parts Co., *Prosecutors,*

v.

MAYOR and COUNCIL OF THE BOROUGH OF NORTH ARLINGTON, *Defendant*

Argued May 6, 1947; decided January 29, 1948. On certiorari.

Before Justices Bodine, Heher and Wachenfeld.

For the prosecutors: Abraham Alboum.

For the defendant: Bruck and Bigel; Milton Bruck, of counsel.

The opinion of the court was delivered by

HEHER, *J.:*

The essential question here is the legal sufficiency of a local ordinance requiring a license, and the payment of an annual license fee of $250, "for each separate and distinct location where the business of engaging in the sale, purchase or exchange of used motor vehicles and parts thereof is maintained or conducted, or where used motor vehicles and parts thereof are being stored for the purpose of sale or exchange." The term "separate and distinct location" is defined to "mean any premises, which consist of a part of one or one or more lots, as set forth on the Tax Map" of the defendant Borough, "and which part of lot or lots are adjacent and contiguous to each other, and if described by metes and bounds would have one continuous and uninterrupted boundary line." And it is provided that the license issued shall describe the location of the business covered thereby; and the licensee is enjoined against the operation of the business at any other location. The ordi-

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nance is a revenue and regulatory measure enacted pursuant to *R. S. 40: 52-1, 40: 52-2.*

Prosecutors devote these premises to the business made the subject of this legislation: (1) Land abutting on the west side of River Road, North Arlington, known as No. 269 River Road, being the southerly portion of Block 130 on the local Tax Map, and Nos. 271-305 River Road, being the northerly and major part of Block 130, which Block 130 fronts about 400 feet on the road and runs back an average depth of 50 feet; (2) Land fronting on the east side of the same thoroughfare, numbered 268-274, in width about 105 feet and in depth about 75 feet; (3) Land on the east side of the road, numbered 304-310, approximately 100 feet x 100 feet; and (4) Premises also on the east side of the road, numbered 288-292, in width 45 feet and in depth 75 feet, used as an "office and main place of business." Block 130 is directly opposite the office building on Location 4. The northerly or major part of Location 1 is used for the display and sale of used motor vehicles; the southerly portion thereof and Locations 2 and 3 are devoted to the storage and sale of parts of used motor vehicles. All of these premises have been used "for the same business since 1924."

It is stipulated that there is no "ordinance licensing and regulating the use of premises by dealers in new motor vehicles and parts;" that premises nearby designated as Nos. 252-266 River Road, containing about 41,000 square feet of land, are devoted to the same business as that conducted by prosecutors, and the Borough requires but one license and one license tax for the premises; and that from 1938 to 1945, only one license fee was exacted from prosecutors for all of its premises.

There were two earlier ordinances providing for the separate licensing of those who deal in used motor vehicles and in parts of such vehicles. The license fee for the former was fixed at $100 for each location, and for the latter at $250 for each location. This court ruled that, in the view of the statute (*40:52-1, supra*), the two constituted but one business and were subject to the licensing power only as a unit. *Ring* v. *North Arlington,* 134 N. J. L. 407.

The ordinance alone is before us for review. The return to the writ of certiorari reveals no adverse action against prosecutors which is subject to judicial examination. The writ restrained the Borough from taking action against prosecutors "for any alleged violations" of the ordinance. The ordinance is challenged as arbitrary, discriminatory and unreasonable, on its face and its application to prosecutors.

The argument, in sum, is that the local legislative definition of a "licensable location" is arbitrary and unreasonable; that prosecutors' premises are "in one closely knit area" and "constitute one business unit and location," each "location" being "only a part, adjunct or auxiliary of the whole business unit," and therefore in fact but "one licensable location," and the requirement of three license fees for as many "locations" is discriminatory and unreasonable; and that, at all events, the license fee of $250, is confiscatory, and, to conform to the standard of reasonableness, the license tax "should be based either on a graduated scale or on the amount of space used." It is said also that the noninclusion in the regulation of dealers in new motor vehicles and parts and the inclusion of a provision for the fencing of vacant land devoted to such use renders the ordinance discriminatory and unreasonable.

The ordinance constitutes the exercise of both the regulatory and revenue functions delegated by the statute cited *supra*. The statute empowers the municipality to levy license or privilege taxes or excises for revenue and also for regulation under the police power in the interest of the public health, safety and general welfare; but there cannot be an arbitary exertion of the power. An arbitrary classification for the purpose either of regulation or taxation would not satisfy the requirements of due process and the equal protection of the law, and so would contravene the Fourteenth Amendment of the Federal Constitution as well as our own Constitution and laws. And this is so whether the power of classification be exercised by the state directly or by a political subdivision thereof to whom the power has been delegated. In either case, it is in the final analysis the exercise of a legislative discretion, and is subject to the constitutional guaranty. But this is the

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only limitation upon the state's power to classify businesses and occupations for revenue or regulation; and the authority of the state may be delegated to its municipalities. *Bradley* v. *Richmond*, 227 U. S. 477, 33 S. Ct. 318, 57 L. Ed. 603. The state legislative authority has a wide discretion as to classification, and even though the distinction be narrow, it suffices if reasonably related to the object of the legislation. There may be a reasonable classification of the objects of the legislation or of the persons whom it affects. The state has a broad discretion in the selection of the subjects of a special tax burden. The courts may intervene only to prevent arbitrary action; and the burden of proof is upon him who asserts an unjust and illegal discrimination. "The rule of equality permits many practical inequalities. • • • What satisfies this equality has not been and probably never can be precisely defined." *New York Rapid Transit Corporation* v. *City of New York*, 303 U. S. 573, 58 S. Ct. 721, 82 L. Ed. 1024. In *Bradley* v. *Richmond*, *supra*, a local ordinance distinguished, as respects the *quantum* of the tax levy, between private bankers engaged in the business of lending money at high interest rates upon salaries and household furniture and those whose business it was to lend money on commercial securities; and it was suggested even there that since there was no showing that these bankers "were doing the same business," the classification was not capricious.

The classification meets the constitutional test of reasonableness if it rests upon some ground of difference having a fair and substantial relation to the object of the legislation. And, where the act levies an excise, the "object" in constitutional intendment is the raising of revenue, not the purpose for which the revenue is to be used. *Colgate* v. *Harvey*, 296 U. S. 404, 56 S. Ct. 253, 80 L. Ed. 299; *New York Rapid Transit Corporation* v. *City of New York*, *supra*. And a classification adequate for regulatory purposes in the exercise of the reserved police power is ordinarily sufficient for the imposition of an excise tax. In the exercise of the power to license for regulation and revenue, distinctions may be made not only between businesses of different character, but also between businesses of the same general class where there are substantial dif-

ferences in the subject matter and trade methods and practices related to the object of the legislation. The inquiry is whether there are differences which warrant separate treatment related to such distinctions. So much for the general power.

Here, the Legislature, by the statute cited *supra*, has made a specific grant of power to the municipalities to license and regulate and tax for local revenue "dealers in second-hand motor vehicles and parts thereof;" and the classification is not inherently arbitrary or capricious. There are just and reasonable distinctions between the businesses of dealing in new and second-hand motor vehicles to support the classification thus made. There is a distinct line of cleavage between the two. The used car business lends itself peculiarly to trade practices and conditions affecting the public welfare not to be found in the new car business. The classification is not vicious on its face; and prosecutors have not borne the burden of proof in this regard. Indeed, there was no evidence *aliunde*. A distinction in legislation "is not arbitrary, if any state of facts reasonably can be conceived that would sustain it." *New York Rapid Transit Corporation* v. *City of New York, supra.*

And it is a corollary of the foregoing considerations that it was within the legislative province to levy a license tax for regulation and revenue upon each and every place of business of the subject class, even though under a common ownership and management. Such an excise is not tainted with the vice of arbitrary discrimination. It imposes no inequality of burden under like circumstances and conditions; and an ordinance framed to overcome the objection now advanced would be open to the same objection, for one having a dozen or more places of business scattered throughout the community would be assessed the same license tax as one having but one place of business, not at all comparable with the former in volume of business done. The scheme adopted here would seem to make for greater equality in the distribution of the excise burden, although we intimate no opinion as to the validity of the proposed alternative method. What was done here was a proper exercise of

legislative discretion. Strict equality is rarely, if ever, attainable in practice in the exercise of the taxing power. Here, physical unity is the quality which renders the business subject to the license tax; and this is a valid exercise of the statutory power. Under the statute, the place where the business is conducted, as well as the person who conducts the business, is subject to the licensing power. Where there is a physical separation of the premises, there is a separate and distinct location whose business is treated as a single economic unit subject as such to the power exerted by the ordinance. There is no indication of illegal discrimination in the fact that another like establishment near to prosecutors', having approximately the same land area as the total of prosecutors' several places of business, is liable for only one license fee as the ordinance is written. As we have seen, an assessment based upon ownership alone would work the same type of inequality. The suggested criterion is plainly illusory. In the exercise of the statutory power, there is no necessary relation between the *quantum* of the excise and the volume of business done or space used, so as to require the assessment of the tax on a graduated scale or in accordance with the space used. Due process and the equal protection of the law impose no such obligation.

The license tax exacted by the ordinance is not confiscatory on its face; and there is no showing that the enforcement of the ordinance would be confiscatory as to prosecutors, assuming that that would be a proper inquiry on the record made. The *quantum* of the tax rests in sound discretion, guided by reason; and judicial intervention is permissible only where there has been an abuse of power. If the local legislative action is not clearly unreasonable or unduly oppressive or discriminatory, its policy is not a justiciable question. *Independent Warehouses, Inc.* v. *Scheele*, 134 N. J. L. 133, affirmed 331 U. S. 70, 67 S. Ct. 1062, 91 L. Ed. 967.

And, if it be conceded *arguendo* that the provision for the fencing of vacant land devoted to such use is invalid and unenforcable (we express no opinion as to this), the ordinance would not thereby be invalidated, for it embodies

a clause that an ineffective or unconstitutional provision shall be deemed severable and shall not affect the remainder of the enactment. *Independent Warehouses, Inc.* v. *Scheele, supra.*

The writ is dismissed, with costs.

APPENDIX "B"

COPY OF OPINION OF SUPREME COURT OF NEW JERSEY

(Not yet reported)

SUPREME COURT OF NEW JERSEY

No. A 5, September, 1948

SHERMAN R. RING and JACK B. BRODY, Individually and Partners trading as R. & B. Truck & Parts Co., Prosecutors-Appellants,

vs.

MAYOR and COUNCIL OF THE BOROUGH OF NORTH ARLINGTON, BERGEN COUNTY, NEW JERSEY, Defendant-Respondent

Argued, September 20, 1948; decided October 4, 1948

On Appeal from the former Supreme Court (whose opinion is reported in 136 N. J. L. 494)

Mr. Abraham Alboum argued the cause for the appellants.

Mr. Milton Bruck argued the cause for the respondent. (Messrs. Bruck & Bigel, attorneys.)

Per CURIAM:

The judgment under review will be affirmed, for the reasons expressed in the opinion filed in the former Supreme Court and reported in *136 N. J. L. 494.* In the course of that opinion, however, the following appears: "And if it be conceded *arguendo* that the provision for the

fencing of vacant land devoted to such use (dealing in used cars) is invalid and unenforcable (we express no opinion as to this), the ordinance would not thereby be invalidated, for it embodies a clause that an ineffective or unconstitutional provision shall be deemed severable and shall not affect the remainder of the enactment."

The appellants on the oral argument waived the ground of appeal directed to the validity of the fencing provisions of the ordinance, and upon this subject we express no opinion.

The judgment is affirmed.